UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION



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| DAVID AARON AND SHIRLEY AARON; | CV95-S-493-NE |
| EMMITT MELTON AND MARIE MELTON; | CV95-S-503-NE |
| ALVIN JONES AND DAPHNE JONES; | CV95-S-504-NE |
| WILLIAM SULLINS AND REBECCA SULLINS; | CV95-S-505-NE |
| JAMES ROBERTS AND EDITH ROBERTS; | CV95-S-506-NE |
| DANIEL DAVIS AND SHERRY DAVIS; | CV95-S-507-NE |
| Plaintiffs, | |
| vs. | |
| LOUISIANA-PACIFIC CORPORATION; RONNIE PAUL; | |
| Defendants. | |



## MEMORANDUM OPINION

This action is before the court on defendants' motion to exclude the testimony of four expert witnesses plaintiffs intend to call at trial[1]: (1) Mark Cocco; (2) B.J. Stephens; (3) Richard Maloy; and (4) Alan Blotcky. The court held a hearing on March 10, 1998. Since that hearing, plaintiffs' counsel submitted a supplemental brief in opposition to defendants' motion and defendants filed a response. Upon consideration of the motion, the briefs in support of and in opposition thereto, the evidentiary

[1] Defendants actually filed two motions to exclude; the first on August 1, 1996 (Doc. No. 47); and the second on October 7, 1996 (Doc. No. 70). This court will consider the filings as a single motion to exclude expert testimony.

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submissions, and the oral arguments of counsel, this court finds that defendants' motion is due to be granted in part and denied in part.

## I. DISCUSSION

As an initial matter, this court will address the applicability of the standard of admissibility reflected in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). In brief and during oral argument, plaintiffs sought to avoid the application of the "*Daubert* factors"[2] for this court's Rule 702 decision on the admissibility of the challenged expert testimony. In essence, plaintiffs argued that each challenged witness' respective opinions were based on that person's experience in his particular field and that, as such,

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[2] The *Daubert* Court identified factors courts should consider when deciding whether expert opinions are reliable. These factors include, but are not limited to a consideration of:

> --Whether a "theory or technique ... can be (and has been) tested";
> --Whether it "has been subjected to peer review and publication";
> --Whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and
> --Whether the theory or technique enjoys "general acceptance" within a "relevant scientific community."
>
> 509 U.S., at 592-594, 113 S.Ct. 2786.

Kumho Tire Company, Ltd. v. Carmichael, ___ U.S. ___, 119 S.Ct. 1167, 1175 (March 23, 1999) (quoting *Daubert*). The *Daubert* Court also cautioned that the factors it identified were not necessarily exhaustive: "Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test[,] [b]ut some general observations are appropriate." 509 U.S. at 593, 113 S.Ct. at 2796.

the testimony was not "scientific." Although acknowledging that Federal Rule of Evidence 702 requires this court to make a determination regarding the relevance and reliability of expert testimony, plaintiffs contend that the *Daubert* factors apply only to testimony which is "scientific."

Plaintiffs found support for this argument in Eleventh Circuit precedent: *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433 (11th Cir. 1997). In the interim, however, the Supreme Court reversed *Carmichael*, holding that:

> *Daubert*'s general holding — setting forth the trial judge's general "gatekeeping" obligation — applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. *See* Fed. Rule Evid. 702. We also conclude that a trial court may consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is "flexible," and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination.

*Kumho Tire Company, Ltd. v. Carmichael*, ___ U.S. ___, 119 S.Ct. 1167, 1171 (March 23, 1999), *reversing Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433 (11th Cir. 1997). The Court went on to discuss the requirements for admissibility under Rule 702: "The Rule ...

establishes a standard of evidentiary reliability ... [and] requires a valid ... connection to the pertinent inquiry as a precondition to admissibility." *Id.* at 1175 (internal quotation marks and citations omitted). The Court said that, when the bases of such testimony are called into question, "the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of [the relevant] discipline." *Id.* at 1175 (internal quotation marks and citations omitted).

This court finds the *Carmichael* Court's application of *Daubert* principles to the opinions of an engineer pertinent to the inquiry at issue here.

> Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases. ... In other cases, the relevant reliability concerns may focus upon personal knowledge or experience.
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> •••
>
> At the same time, and contrary to the Court of Appeals' view, some of *Daubert*'s questions can help to evaluate the reliability even of experience-based testimony. In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.

119 S.Ct. at 1175-76 (citations omitted).

**A. Mark Anthony Cocco**

Plaintiffs proffer the testimony of Mark Anthony Cocco, ASP, who would testify that defendant Louisiana-Pacific Corporation ("LPC") failed to conduct noise level studies before construction of the Hanceville plant, that absent such failure LPC could have reduced the noise levels at the plant, and that measures can be taken now to reduce those noise levels. Plaintiffs argue that "Cocco's education and experience, the noise level readings taken by himself and [another of plaintiffs' expert witnesses], and the EPA standards which Cocco has used indicate that his testimony will be useful and necessary to a jury in making a determination in these matters." (Plaintiffs' submission of March 30, at 2.)

Defendants cite Cocco's deposition testimony, demonstrating he had never conducted a noise level study before he was retained for purposes of this case, he did not know how to conduct one, and he was unaware if having such a study performed is standard in the industry. (*See* Defendants' post-hearing brief, Doc. No. 82, at 1.) Moreover, defendants identify weaknesses in Cocco's suggestions. First, Cocco has no information and has conducted no analysis regarding the feasibility of his suggestions. Similarly Cocco does not know whether implementation of his suggestions actually would

reduce the noise emitted from the plant. (*See id.* at 2.)

This court finds the following colloquy, which occurred during Cocco's deposition, material to the reliability determination:

> Q: Can you tell me today any steps that Louisiana-Pacific should have taken to reduce the noise in the plant?
>
> A: Again, that would have to be determined through an understanding of which machines were producing the worst part of the noise. Some suggestions possibly could be putting the machines on a surface that is going to attenuate the noise; insulate the sides of the building and the roof maybe; maybe cover the noise sources to an extent. Another possibility would be looking at different handling procedures in reducing the noise.
>
> Q: Now, have you done any study to determine whether or not any of these measures were feasible?
>
> A: No. But, again, I have, in past experiences with trying to control noise exposure, have used some of these methods.
>
> Q: You haven't done any study to determine whether or not any of these methods would have been feasible at Louisiana-Pacific's plant in Hanceville?
>
> A: No, I don't [*sic*].
>
> Q: Have you done any study to determine if any of these methods are standard in the industry?
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> •••
>
> A: Oh, that, I don't know.
>
> Q: And can you tell me how much, if at all, that any of these measures would have reduced any noise emitted from the plant?

A: I guess I — I don't know that ....

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Q: Just to make sure I understand your answer, you don't know how much, if any, if at all, any of these measures would have reduced the noise emitted from the plant?

A: No, I don't.

Q: And you haven't done any study to try to determine that?

A: I don't have nearly enough information to do that.

(Cocco deposition, at 59-62.)

Whether or not this court applied the factors delineated in *Daubert*, Mr. Cocco's testimony is not reliable under Rule 702. There is an insufficient tie to the Hanceville plant, making his shaky suggestions too speculative. No analysis supports an opinion that these measures feasiblely could be taken, or that they would have success in abating the noise emissions of the Hanceville plant. In fact, it is not clear upon what basis Mr. Cocco grounds his suggestions, other than simply having seen some measures employed in other noisy factories. Such an observation is far from "expert." Instead, the suggestions found in Cocco's opinions are not too far removed from the absurd suggestion the undersigned facetiously offered during the hearing: construct a Louisiana-style "Super-Dome" over the plant. Although the respective determinations of the efficacy, reasonableness, and feasibility of

such an extreme measure probably would be more facile, the suggestion certainly is not sufficiently reliable to be admitted under Rule 702. In short, this court finds that the flaws in the foundation of Cocco's opinions, which were exposed during the deposition, preclude the requisite finding of a "valid ... connection to the pertinent inquiry." *Carmichael*, 119 S.Ct. at 1175.

**B. B. J. Stephens**

Plaintiffs also proffer the testimony of B. J. Stephens, Ph.D., P.E., a mechanical engineer who has offered opinions regarding measures LPC could take to reduce the level of noise emitted from the Hanceville plant. Defendants challenge this testimony as unreliable, because Stephens did not properly conduct a noise measurement, yet based his suggestions on an admittedly unreliable one, and because he has not conducted studies that he concedes would be necessary to determine whether implementing his suggestions at the Hanceville site would be effective or feasible.

With regard to the noise measurement Stephens relies upon, defendant identifies relevant language from *Carmichael*:

> The objective of [the *Daubert* gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal

> experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

119 S.Ct. at 1176. Stephens testified that he had planned to return to the plaintiffs' homes to conduct a proper sound measurement, and that the single measurement he took on his ultimately lone visit to the area was "not very reliable for doing any type of research with." (Stephens deposition, at 63.) Stephens then described the procedure which would have to be undertaken to yield reliable results. Stephens neither conducted nor relied upon a study following such procedures. Thus, by his own admission, the basis of Stephens' opinions regarding the noise at the Hanceville site — *i.e.*, a single, unscientific measurement — would not satisfy any of the *Daubert* factors.

Stephens suggests several procedures that LPC could implement to abate the noise from the plant; yet, even on the date he visited, Stephens was unaware if LPC had already taken many of these steps, or if such steps would in fact reduce the noise emitted. In addition, Stephens has not analyzed the admittedly questionable feasibility of some suggestions. (*See* Stephens deposition, at 101-110.) In fact, by way of example, Stephens offered a "[p]ie in the sky" suggestion strikingly similar to the

aforementioned proposal of the undersigned: "[Y]ou could put the hopper inside a building, enclose the entire debarking area so that the trucks actually come into a building and are unloaded by the crane inside a building." (*Id.* at 109.) Not surprisingly, however, Stephens did not know if such a measure would prove economically feasible, or if any plant in the country had undertaken such a measure. (*See id.*)

For the reasons stated above, including those discussed for the testimony of Cocco, the court finds the proposals Stephens would offer not sufficiently grounded to the facts of this case or to generally acceptable methods of analysis and, thus, inadmissible under Federal Rules of Evidence 702 and 403.

**C. Richard A. Maloy**

Richard A. Maloy, MAI, SRA, J.D., will offer his opinions of the reduced market value of plaintiffs' homes caused by the noise emissions of the LPC plant. Maloy performed a "Paired Sales Analysis" for each plaintiff's property under the "Sales Comparison Approach," which Maloy believes is the method most revealing of the effect external environmental factors such as noise have on property value. In his analysis, Maloy "researched several other conditions and found a range of effect on value." (Maloy

deposition, at 52.) Maloy compared the effect of factors which have a similar impact on market value in residential areas, such as noise, lighting, and dense commercial activity. Maloy testified that "[i]t's fairly easy to draw a comparison between those different influences." (*Id.*) Upon consideration of the reports from the sound experts, interviews with plaintiffs, and visits to the various properties, Maloy determined that the plaintiffs' properties were effected at the lower end of the aforementioned range. Maloy said that determination was, as are all appraisals, "an exercise in judgment." (*Id.* at 53.)

During the deposition, defense counsel focused on the comparison between the property at issue and one of the groups Maloy used: houses located near the Birmingham airport. Counsel targeted the validity of this comparison, noting that Maloy had conducted noise measurements in neither area. Ultimately, counsel sought to undermine the expert analysis because the level of noise emitted could not be established as closely similar. That inquiry notwithstanding, Maloy maintained that such a direct comparison of decibel levels was not essential to finding an accurate, proportionate range of effect on market value. (*Id.* at 53-68.) In fact, Maloy said that, in following this standard form of analysis,

he used the documented impact of external factors other than noise in his analysis.

This court finds Maloy's well-documented analysis sufficiently relevant and reliable to satisfy the standards of admissibility in the Federal Rules of Evidence. That is not to say that such testimony will be immune from defense counsel's entirely appropriate line of inquiry on cross-examination, which may find receptive ears on a jury. As the *Daubert* Court said: "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 596, 113 S.Ct. at 2798.

**D. Alan D. Blotcky**

Alan D. Blotcky, Ph. D., is a clinical psychologist who proposes to testify about various mental disorders which afflict plaintiffs. His opinions are founded upon a single interview with each plaintiff-couple, and not upon any testing. Dr. Blotcky identifies "dysthemic depressive disorder" as a condition to which plaintiffs have fallen prey, and one no available tests can confirm. (Plaintiffs' submission of March 30, at 3.)

Defendants challenge the reliability of this expert's

testimony.[3] This court notes that Dr. Blotcky conducted all interviews in one day at the office of plaintiffs' counsel. Each interview lasted roughly one hour, and all interviews were conducted with the couples jointly — *i.e.*, with the husband and wife together, not individually. Moreover, defendants cite a portion of Dr. Blotcky's testimony relevant to his ability to accurately diagnose the plaintiffs' psychological conditions in such a cursory fashion:

> Q: Are you aware of any literature or any material that is used in your profession to determine when a noise level is sufficient to cause some disturbance in people?
>
> A: I don't know that in the psychological literature. I'm sure it's there somewhere, but I'm not familiar with it. You mean like decibel level or that kind of stuff?
>
> Q: It's not something that you're familiar with and use on a regular basis?
>
> A: I'm not familiar with it and I don't use it.

(Blotcky deposition, at 43-44.) Plaintiff argues, however, that Dr. Blotcky relied upon the Diagnostic and Statistical Manual in his evaluation of plaintiffs. The court notes that Dr. Blotcky was cognizant of those guidelines, but that he finds them "somewhat flexible" and did not necessarily rely on them. (*Id.* at 42.)

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[3] Defendants also challenge the relevance of this testimony, contending that mental anguish damages are not recoverable in this action where no physical injury is alleged. The court addresses this objection in a separate order.

The court finds this testimony to be little or nothing more than Dr. Blotcky vouching for the plaintiffs' testimony. Dr. Blotcky's conclusory analysis shows no effort to eliminate or account for the many other factors that may bear on plaintiffs' psychological well-being, or on any disorder that may exist. Such testimony is unreliable and should be excluded under Rules 702 and 403.

## II. CONCLUSION

An order consistent with this memorandum opinion will be entered contemporaneously herewith.

**DONE** this 29th day of June, 1999.

United States District Judge